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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF FOR PETITIONER

D. ALAN RUDLIN
W. JEFFREY EDWARDS
Hunton & Williams
P.O. Box 1535
Richmond, Virginia 23212
(804) 788-8200

J. BENJAMIN DICK
Suite 2
421 Park Street
Charlottesville, Virginia 22901

GERALD E. POINDEXTER
Surry Courthouse Square
Surry, Virginia

J. LEVONNE CHAMBERS
ERIC SCHNAPPER*
NAACP Legal Defense &
Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

SAMUEL W. TUCKER
Hill, Tucker & Marsh
P.O. Box 27363
Richmond, Virginia 23261

*Counsel of Record

Attorneys for Petitioner

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REPLY BRIEF FOR PETITIONER

I. THIS COURT HAS JURISDICTION OVER ALL OF THE QUESTIONS SET FORTH IN THE PETITION

When this Court reviews an order finally adjudicating the rights of parties to a civil action, the Court's jurisdiction encompasses review of all earlier decisions on which that final order rests:

> We now "consider all of the substantial federal questions determined in the earlier litigation"... for it is settled that we may consider questions raised on the first appeal, as well as "those that were before the Court of Appeals on the second appeal"

Mercer v. Theriot, 377 U.S. 152, 153-54 (1964).[1] This Court, in reviewing such a

[1] See also Reece v. Georgia, 350 U.S. 85, 87 (1956) ("We have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of litigation"); Urie v. Thompson, 337

final order, has not hesitated to address legal issues which were the subject of an earlier unsuccessful petition for certiorari[2], or of a writ that had been previously dismissed as improvidently granted[3], or regarding which the petitioner could earlier have sought, but

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U.S. 163, 171-73 (1949) (Court has jurisdiction to consider "all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review").

[2] Barclay v. Florida, 463 U.S. 939, 945-56 (1983) (earlier denial of certiorari reported at 439 U.S. 892 (1978)); Hanover Shoe Co. v. United Shoe Machine Corp., 392 U.S. 481, 488 n.6 (1968) (earlier denial of certiorari: reported at 364 U.S. 901 (1960)); Mercer v. Theriot, 377 U.S. 152, 153 (1964) (earlier denial of certiorari reported at 359 U.S. 983 (1959)); Indianapolis v. Chase National Bank, 314 U.S. 63, 71 (1941) (earlier denial of certiorari reported at 305 U.S. 600 (1938)).

[3] Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 365 n.1 (1973) (dismissal of earlier writ reported at 380 U.S. 248 (1965)).

failed to seek, review by this Court.[4]

In Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916), this Court unanimously rejected the very jurisdictional argument now advanced by respondent in this case. In Hamilton-Brown, as here, the first appeal, although resolving the issue of liability, remanded the case for further proceedings regarding the scope of the remedy, and this Court initially denied certiorari. 214 U.S. 514 (1909). When certiorari was granted following the entry of the subsequent decree, the respondent contended that the Court had no jurisdiction over the liability issues. In rejecting that contention the court emphasized:

> [E]xcept in extraordinary cases, the writ [of certiorari] is not issued

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[4] Reece v. Georgia, 350 U.S. 85, 87 (1956).

> until final decree. ...[T]he refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree sought to be reviewed. ...[T]his Court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings.

240 U.S. at 257-58

Respondent appears to believe that the earlier denials of certiorari in this case constituted decisions on the merits, arguing that in the wake of those denials that petitioner "has had his day in [this] court." (Br. Opp. 5). Justice Frankfurter admonished over a generation ago that a denial of certiorari

> carries with it no implication whatever regarding the merits of a case which [the Court] has declined to review. The Court has said this again and again; again and again this admonition has to be repeated.

Maryland v. Baltimore, 338 U.S. 912, 919 (1950) (Frankfurter, J.). Thus

> a mere denial of the writ to an interlocutory ruling of the circuit court of appeal does not limit our power to review the whole case when it is brought here by our certiorari on final decree.

Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 418 (1923).

Respondent urges that, when the lower courts determine the issues of liability in a civil action but defer adjudication of the appropriate remedy, the liability determination is a final order which not only can but must be reviewed at once by this Court if it is to be reviewed at all (Br. Opp. 4). In Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 (1976), this Court unanimously rejected that very contention, as it had in at least nine earlier cases.[5]

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[5] NAACP v. Williams, 359 U.S. 550, 551 (1959) (Douglas, J.) (order imposing $25,000 fine subject to modification as to amount not final); California National

If, as respondent contends, every liability determination is a final order even though the remedy to be awarded remains unresolved, many civil actions would automatically require two separate appeals, and review of interlocutory orders by this Court would become the rule rather than the exception. In the instant case, had the trial court following the 1985 remand awarded only nominal damages of $1, the litigation would for all practical purposes have been rendered

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Bank v. Stateler, 171 U.S. 447, (1898) (order contemplating further proceedings to calculate costs, disbursements and fees not final); Craighead v. Wilson, 59 U.S. 199 (1856) (order in estate case determining heirs, but deferring calculation of inheritances, not final); Beebe v. Russell, 60 U.S. 283 (1857); Keystone Manganese & Iron Co. v. Martin, 132 U.S. 91 (1889); Lodge v. Twell, 135 U.S. 232 (1890); McGourkey v. Toledo & Ohio C. Railway Co., 146 U.S. 536 (1892); United Mutual Life Insurance Co. v. Kirchoff, 160 U.S. 374 (1896); Hollander v. Fechheimer, 162 U.S. 326 (1896).

moot. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) cannot be understood to require that certiorari be granted before such a possibility of mootness has been eliminated.

II. THE VERDICT IN THIS CASE WAS UNCONSTITUTIONALLY EXCESSIVE

Respondent asserts that there have been other cases in which juries awarded damages in excess of $100,000 to plaintiffs who suffered no economic injury whatever and that punitive damages of more than $250,000 are equally common. (Br. Opp. 33-40). The size of the verdicts recounted by the respondent, we believe, is indicative of the importance and recurring nature of the issues raised by question 2 in our petition.

The constitutionality of the verdict in this case should be measured, not by the extent to which exorbitant libel

verdicts may currently be in fashion, but by the historical principles that underlie the First Amendment. If certiorari is granted, we will urge that the enormous verdict in this case is inconsistent with the First Amendment for at least three distinct reasons.

First, we contend, a libel plaintiff is under at least as great an obligation as any other plaintiff to mitigate his damages. This Court held as much in Gertz v. Welch, 418 U.S. 323 (1974), emphasizing that "[t]he first remedy of any victim of defamation is self-help -- using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation." 418 U.S. at 344. Under the First Amendment the preferred form of redress for objectionable speech is more speech; a libel

action is available, if at all, only to the extent that such corrective self-help has proved ineffective. The common law obligation to mitigate damages is a rule of constitutional dimension in a libel case.

The alleged libel in the instant case was contained in a $88.00 advertisement in a college newspaper. Respondent could, at nominal expense, have printed a reply that would have been circulated to precisely the same audience that might have seen the original advertisement. But unlike the plaintiff in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 86 L.Ed.2d 593 (1985), who took all possible action to correct the allegedly inaccurate statement, 86 L.Ed.2d at 597-98, the plaintiff in this action took absolutely no steps to contradict or dispute the

alleged libel, and now insists he was not obligated even to "writ[e] a letter to the editor denying the charges." (Br. Opp. 49). In the absence of the self-help measures required by Gertz, the First Amendment precludes any award of more than nominal damages. Cf. Ford Motor Co. v. E.E.O.C., 458 U.S. 219 (1982).

Second, we contend that the First Amendment precludes any award of punitive damages in a libel case, at least where matters of public concern are involved. Because the avowed purpose of punitive damages is to punish the defendant, and because the amount of such damages is measured in part by the gravity of the perceived "offense", punitive damages are essentially "private fines". Gertz v.

Welch, 418 U.S. 323, 350 (1974).[6] Such punitive measures are constitutionally indistinguishable from a criminal fine, and may only be imposed under the circumstances in which a criminal sanction would be constitutionally permissible. "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." New York Times v. Sullivan, 376 U.S. 1, 277 (1964). The types of libel which may constitutionally be declared criminal are far narrower than ordinary libel; criminal libel is limited to utterances with a "tendency to cause breach of the peace." Beauharnais v. Illinois, 343 U.S. 250, 254 (1952). If,

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[6] Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (an action for punitive damages is a "quasi-criminal" proceeding).

as Beauharnais indicates, a state could not impose a criminal fine for other types of libels, ipso facto it cannot authorize civil juries to impose private fines in such cases.

Because the imposition of a punishment for allegedly libelous speech implicates both First and Eighth Amendment interests, the appropriate level of any such sanctions must be established by an elected legislature, rather than by an ad hoc collection of jurors who may be prompted by personal or partisan passions. Cf. Spaziano v. Florida, 82 L.Ed.2d 340 (1984). In Virginia the state legislature, presumptively expressing the views of the community as to the appropriate degree of punishment for various types of offenses, has concluded that in the case of criminal libel tending to provoke

violent conduct the maximum permissible punishment should be a fine of no more than $500. See Code Va. §§ 18.2-11(c), 18.2-417. In the instant case, the private fine of $166,666.00 is 333 times higher than the maximum fine that could have been imposed had petitioner been guilty of the far more serious conduct which Virginia categorizes as criminal libel. The sentence upheld by this Court in Beauharnais itself was only a $200 fine. The size of the private fine imposed in this case raises substantial questions under the Eighth as well as the First Amendment.

The past decisions of this Court have not sanctioned the use of punitive damages to impose for non-criminal libels a punishment far in excess of the punishment authorized for criminal libel

itself. In 1974 Gertz noted the dangers inherent in any use of punitive damages in a libel action. Since Gertz the only instance in which this Court has upheld an award of punitive damages in a libel action is Dun & Bradstreet v. Greenmoss Builders, 86 L.Ed.2d 593 (1985), a case in which the defendant did not question the propriety of punitive damages as such, and which turned on the fact that the speech involved was not a matter of public concern.

In Newport v. Fact Concerts, 453 U.S. 247 (1981), this Court refused to permit awards of punitive damages in § 1983 actions against municipalities because of the danger of crushingly exorbitant awards. 453 U.S. at 270-71. In Electrical Workers v. Foust, 442 U.S. 42 (1979) the Court forbade the imposition

of punitive damages under the Railway Labor Act, reasoning that the spectre of such awards might well deter entirely proper conduct. 442 U.S. at 50-52.[7] Members of this Court have repeatedly emphasized the danger that punitive awards will merely express a jury's hostility towards a particular defendant or towards the unpopular views a defendant may have espoused. Gertz, 418 U.S. at 351 (jury discretion used "to punish expressions of unpopular views"); Electrical Workers v. Foust, 442 U.S. at 50 n.14 (verdicts may reflect "[c]ommunity hostility towards unions, management, or minority views"); Smith v. Wade, 461 U.S. at 59 (Rehnquist, J., dissenting) ("punitive damages are

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[7] See also Smith v. Wade, 461 U.S. at 94 (O'Connor, J., dissenting) (punitive damages in section 1983 cases against officials may "chill public officials in the performance of their duties").

frequently based upon the ... prejudice of jurors"). *This danger of abuse, together* with the chilling effect of potentially enormous judgments, compel the conclusion that the award of punitive damages in libel actions is inconsistent with the First Amendment.

Third, we believe that the First Amendment precludes a state from awarding compensatory damages in a libel action such as this where the plaintiff asserts as his sole injury that he was "embarrassed and humiliated" (Pet. App. 94). Although the existence of a civil action for libel may be consistent with the First Amendment, the scope of such an action cannot in general be broader than the scope of libel actions that were permitted under the common law at the time the First Amendment was adopted. In the late

eighteenth century judges and juries were clearly forbidden to award damages for the sort of hurt feelings and tainted honor of which respondent complained in the instant case. At common law permissible libel actions were generally limited to three specific instances -- libels causing economic injury to plaintiff's trade or business, libels placing a plaintiff in danger of criminal prosecution, and libels which resulted to a substantial and demonstrable degree in social ostracization of the plaintiff. Blackstone's Commentaries, v. iii, pp 123-25 (St. George Tucker Ed., 1803); F.Holt, The Law of Libel, 161 (1812). All of the examples of compensable injury recited by Blackstone were economic in nature. Commentaries, v.iii, pp 123-25.

The types of libels and injuries for

which the states award damages today are far broader than those permitted in the eighteenth century. The creation by the state courts of libel actions for humiliation, anguish, and emotional suffering marks a radical redefinition of the boundary between actionable libel and constitutionally protected free speech. This drastic expansion of libel law clearly raises serious constitutional questions. Cf. T. Cooley, Treatise on Constitutional Limitations, 430 (1868).[8]

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[8] Although libel actions today, as in the eighteenth century, may not be limited to solely economic injuries, the scope of non-economic injuries for which recovery could be had in 1791, and which would be consistent with the First Amendment, is, we urge, decidedly narrower than the broad language of Gertz, 418 U.S. at 349-50, and Time, Inc. v. Firestone, 424 U.S. 448, 460-61 (1976). In Firestone the plaintiff won $100,000 in damages because of a false allegation that she had committed adultery, 424 U.S. at 458-59; Blackstone regarded an allegation of adultery as a paradigm of the sort of statement that was

Under these circumstances, even if the finding of liability was correct, the First Amendment forbade the state courts from awarding more than nominal damages. Carey v. Piphus, 435 U.S. 247 (1978).

CONCLUSION

For the above reasons a writ of certiorari should be issued to review the

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not actionable at common law. Commentaries,. v. iii, p. 124.

judgments and opinions of the Virginia Supreme Court.

Respectfully submitted,

J. LeVONNE CHAMBERS
ERIC SCHNAPPER*
NAACP Legal Defense & Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, NY 10013

Attorneys for Petitioner

*Counsel of Record